IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7573 of 1999
With
SPECIAL CIVIL APPLICATION No. 9712 of 1999
With
SPECIAL CIVIL APPLICATION No. 8794 of 1999
With
SPECIAL CIVIL APPLICATION No. 8498 of 1999
With
SPECIAL CIVIL APPLICATION No. 8421 of 1999
With
SPECIAL CIVIL APPLICATION No. 8667 of 1999
With
SPECIAL CIVIL APPLICATION No. 8666 of 1999
With
SPECIAL CIVIL APPLICATION No. 10966 of 2000
With
SPECIAL CIVIL APPLICATION No. 10349 of 2000
With
SPECIAL CIVIL APPLICATION No. 9878 of 2000
With
SPECIAL CIVIL APPLICATION No. 8066 of 2000
With
SPECIAL CIVIL APPLICATION No. 9222 of 2000
With
SPECIAL CIVIL APPLICATION No. 9150 of 2000
With
SPECIAL CIVIL APPLICATION No. 9874 of 2000
With
SPECIAL CIVIL APPLICATION No. 7378 of 2000
With
SPECIAL CIVIL APPLICATION No. 13430 of 2003
With
SPECIAL CIVIL APPLICATION No. 9971 of 2003
With
SPECIAL CIVIL APPLICATION No. 9345 of 2004
With
SPECIAL CIVIL APPLICATION No. 11314 of 2000
With
SPECIAL CIVIL APPLICATION No. 8017 of 1999
With
SPECIAL CIVIL APPLICATION No. 12470 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MARKETYARD COMMERCIAL CO-OP BANK LTD - Petitioner(s)

Versus

STATE OF GUJARAT & 3 - Respondent(s)

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SPECIAL CIVIL APPLICATION NOs. 7573/1999, 9712/1999, 8794/1999, 8498/1999, 8421/1999, 8667/1999, 8666/1999, 10966/2000, 10349/2000, 9878/2000, 8066/2000.

Appearance :

MR PRAKASH K JANI for Petitioner(s) : 1,
MR S.N.SHELAT, ADVOCATE GENERAL, MS SHRUTI TRIVEDI, Assistant Government Pleader for Respondent(s) : 1 - 3.
RULE SERVED for Respondent(s) : 2,
MR PV HATHI for Respondent(s) : 4,

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SPECIAL CIVIL APPLICATION NOs. 9222/2000, 9150/2000, 9874/2000.

Appearance :

MR PRAKASH K JANI for Petitioner(s) : 1,
MR S.N.SHELAT, ADVOCATE GENERAL, MR HD DAVE, Assistant Government Pleader for Respondent(s) : 1 - 3.
RULE SERVED for Respondent(s) : 2,
MR PV HATHI for Respondent(s) : 4,

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SPECIAL CIVIL APPLICATION NOs. 7378/2000

Appearance :

MR Shrish Joshi for Petitioner(s) : 1,
MR S.N.Shelat, Advocate General, MR HD Dave, Assistant Government Pleader for Respondent(s) : 1 - 3.
RULE SERVED for Respondent(s) : 2,
MR PV HATHI for Respondent(s) : 4,

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SPECIAL CIVIL APPLICATION NOs. 13430/2003

Appearance :

MR HV Chhatrapati for Petitioner(s) : 1,
MR S.N.Shelat, Advocate General, MR HD Dave, ASSISTANT GOVERNMENT PLEADER for Respondent(s) : 1 - 3.
RULE SERVED for Respondent(s) : 2,
MR PV HATHI for Respondent(s) : 4,

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SPECIAL CIVIL APPLICATION NOs. 9971/2003

Appearance :

MR PS Gogia for Petitioner(s) : 1,
MR S.N.Shelat, Advocate General, MR HD Dave, Assistant Government

Pleader for Respondent(s) : 1 - 3.
RULE SERVED for Respondent(s) : 2,
MR PV HATHI for Respondent(s) : 4.

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SPECIAL CIVIL APPLICATION NOs. 9345/2004

Appearance :
MR Manav A Mehta for Petitioner(s) : 1,
MR S.N.Shelat, Advocate General, MR HD Dave, Assistant Government Pleader for Respondent(s) : 1 - 3.
RULE SERVED for Respondent(s) : 2,
MR PV HATHI for Respondent(s) : 4,

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SPECIAL CIVIL APPLICATION NOs. 11314/2000

Appearance :
MR Tushar Mehta for Petitioner(s) : 1,
MR S.N.Shelat, Advocate General, MR HD Dave, Assistant Government Pleader for Respondent(s) : 1 - 3.
RULE SERVED for Respondent(s) : 2,
MR PV HATHI for Respondent(s) : 4,

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SPECIAL CIVIL APPLICATION NOs. 8017/1999

Appearance :
MR HL Patel for Petitioner(s) : 1,
MR S.N.Shelat, Advocate General, MR HD Dave, Assistant Government Pleader for Respondent(s) : 1 - 3.
RULE SERVED for Respondent(s) : 2,
MR PV HATHI for Respondent(s) : 4,

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SPECIAL CIVIL APPLICATION NOs. 12470/2004

Appearance :
MR MK Vakharia for Petitioner(s) : 1,
MR S.N.Shelat, Advocate General, MR HD Dave, Assistant Government Pleader for Respondent(s) : 1 - 3.
RULE SERVED for Respondent(s) : 2,
MR PV HATHI for Respondent(s) : 4,

CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 05/10/2005

ORAL JUDGMENT

1. In all the aforesaid petitions, a common question of law has been raised to the effect whether the Government of Gujarat is liable for the failure of the Government

Company viz. Gujarat Small Industries Corporation_Limited – Respondent No.4, in making payment of non – convertible Bonds issued by the Government Compnay.

2. The learned Counsel appearing for both the sides have considered Special Civil Application No. 7573/1999 as the lead matter. As per Section 71 of the Gujarat Co-operative Societies Act, 1961 (hereinafter referred as **"Act, 1961"** for short), the petitioner-Cooperative Society may invest or deposit its fund in Central Bank or the State Bank of India or in the postal Savings Bank etc. which are referred to in Section 71 of the Act, 1961. There is also a provision of sub-section 1(g) of the Section 71 of the Act, 1961 for getting approval of the Registrar, in case of deposit in any other company, other than which are referred in Section 71. In pursuance of this provision, the petitioner-society applied to Respondent Nos. 1 and 2-State of Gujarat for investing of its funds in the Gujarat Small Industries Corporation Limited (which is a Government Company).

3. The permission was also granted by the State of Gujarat *vide* its order dated 18th November, 1997 under Section 71(1)(g) of the Act, 1961. In pursuance of this permission, the petitioner-society invested the amount in

Gujarat Small Industries Corporation Limited which is a Government Company. Unsecured Non-Convertible Bonds in the nature of promissory notes were issued to the petitioner-Society (Annexure – C to the memo of the petition). Because of the financial difficulties, the Gujarat Small Industries Corporation Limited i.e, Respondent No.4 was not able to make payment of non-convertible debentures. The said Bonds were issued for 17 months and 29 days from the date of allotment i.e, from 30th December, 1997, but the said Corporation was unable to redeem the said Non-Convertible Bonds. As Respondent No.4 is a Government of Gujarat Company, the money ought to be returned by the State of Gujarat to the petitioner. It is also submitted by the learned Counsel for the petitioner that Respondent No.4 is a Public Sector Undertaking Company which is owned, run and managed by the Government of Gujarat and because of the permission given by the Government under Section 71(1)(g) of the Act, 1961, the amount was invested by the petitioner in Gujarat Small Industries Corporation Limited. It is also submitted by the learned Counsel for the petitioner that the salaries of the employees of the Respondent No.4 - Corporation has also been paid by the Government corpus. The Government has released sizeable amount for the payment of salaries to the employees. It

is the liability of the Government to develop the industries under the Industries (Development and Regulation) Act, 1951 and therefore, Respondent No.4 Corporation was performing the functions of the Government and it being an instrumentality of the State of Gujarat, for the non-fulfillment of the liabilities of Respondent No.4 Corporation Limited, the Government of Gujarat is responsible. The learned Counsel appearing for the petitioner has relied upon the case decided by Hon'ble Supreme Court in ***Kapila Hingorani v. State of Bihar reported in (2003) 6 SCC 1***. The learned Counsel for the petitioner has also relied upon the following judgments:

(i) AIR 1975 SC 1331 : Paras 80,81,82,83 upto 107
(ii) AIR 1979 SC 1628 : Paras 11 to 21 and 33.
(iii) AIR 1980 SC 840 : Para 21 and 22
(iv) AIR 1981 SC 212 : Para 22, 23, 23-A, 23-B, 23-C, 23-D, 27,28,30,32,33,36,29,54,55 and 77.
(v) AIR 1988 SC 1737 : Paras 50, 62, 63, 64, 65, 66,67, 68
(vi) AIR 1996 SC 2005 : Paras 28, 31, 32, 33, 34, 35.
(vii) 2003(6)SCC 1 : Paras 27, 28, 30 to 39, 48, 49, 53, 54, 55, 61, 63, 64, 67, 68, 70, 71, 73.
(viii) DHN Food Distributors Ltd and others V. London Borough of Tower Hamlets reported in All England Law Reports [1976] 3 ALL ER 462

4. I have heard learned Advocate General for the State of Gujarat who has mainly submitted that the petitions are not maintainable in law. The present petitions are nothing but a suit for recovery of money based upon Non-Convertible Bonds in the nature of Promissory Notes issued by Respondent No.4. It is also submitted by the learned Advocate – General that there is no privity of contract between the petitioner-Bank and the State Government. It is further submitted that there is no enforceable right vested in the petitioner and there is no fundamental right, no legal right and no contractual right vested in the petitioner to get the recovery of the money from the State Government. The State is not a guarantor of Respondent No.4 Corporation Limited. In fact Annexure – C to the memo of the petition reveals that the Non-Convertible Bonds which are in the nature of promissory notes issued by Respondent No.4 to the petitioners are nothing but unsecured, Non-Convertible Bonds and, therefore, the State of Gujarat is not responsible for non-payment of the amount to the petitioner by Respondent No.4. The learned Advocate-General appearing for the State has relied upon the following judgments delivered by the Hon'ble Supreme Court and other High Court:

(i) AIR 1962 SC 1320
(ii) AIR 1965 SC 1740

(iii) (2004) 9 SCC 786
(iv) AIR 1999 SC 1734
(v) AIR 1999 SC 2573
(vi) AIR 1999 SC 2552
(vii) AIR 1997 SC 2275
(viii) AIR 1976 Kerala 37
(ix) JT 2003 (5) SC 1
(x) JT 2003 (4) SC 328
(xi) JT 2003 (6) SC 68

5. It is vehemently submitted by the learned Advocate General on behalf of the State that merely recommending the institution in which the petitioner could invest the amount, fetches no liability of the Government. Thus, recommendations cannot make the State liable. As the liability is arising out of the contract between the petitioner and Respondent No. 4, the State Government is not a party thereto neither there is any privity contract between the petitioner and State Government. Even, the memorandum of Association of Respondent No.4 Corporation-Limited (Annexure – I to the further affidavit filed by the petition) reveals that the liability of the company is limited. It is further submitted by the learned Advocate General that some of the amount was released from the State renewal fund for the payment of voluntary retirement scheme to the employees of Respondent No.4 Corporation Limited vide order dated 30th November, 1999 (Annexure – III to the further affidavit filed by the petitioner) is to be treated as unsecured loans to

Respondent No.4 Corporation as per condition No.2 attached with it. The said amount was released because fundamental right vested in the employees under Article 21 of the Constitution was violated. No such right is vested in the petitioner because present petitions is for recovery of the money which was invested by the petitioner in Respondent No.4 Corporation and therefore, it is further submitted by the Learned Advocate General that petitions may not be entertained by this Court in exercise of extra ordinary jurisdiction conferred upon this Court under Article 226 of the Constitution of India.

6. I have also heard learned Counsel Mr. Hathi appearing on behalf of Respondent No.4 Corporation-Limited, who submitted that the present petitions is not tenable in law. The money suit ought to be filed before the lowest available Court. Several suits are pending. There are 28 cases e.g. Civil Suit No. 1699/2001 and similarly Civil Suit No. 1089/2001 in the Trial Court. Thus, for recovery of money Civil Suit ought to be filed by the petitioner. Mr. Hathi has further submitted that because of financial constraints, Respondent No.4 is not in a position to redeem unsecured, non-convertible Bonds in the nature of Promissory Notes. There is no privity of

contract between the petitioner and Respondent No. 1 and 2 neither Respondent Nos.1 and 2 are the guarantors of Respondent No.4, therefore, petitions may not be entertained by this Court. In fact, there is no prayer against Respondent No.4 Corporation-Limited.

7. Having heard learned Counsels for both the sides and looking to the facts and circumstances of the case, the documents on record, and the judicial pronouncement which are referred to hereinafter, I see no reason to entertain the present petitions especially for the following facts and reasons:

(i) The petitioner, a Co-operative Society has purchased Unsecured, Non-convertible Bonds in the nature of Promissory Notes and has invested the amount in the Gujarat Small Industries Corporation Limited. Section 71 of the Act, 1961 reads as under:

> “71. Investments of funds: -
> a)in a Central Bank, or the State Co-operative Bank,
> b)in the State Bank of India,
> c)in the Postal Savings Bank,
> d)In any of the securities specified in Section 20 of the Indian Trusts Act, 1882 (II of 1882)
> e)in shares, or security bonds, or debentures, issued by any other society with limited liability; or
> f)in any co-operative bank or in any

banking company approved for this purpose by the Registrar, and on such conditions as the Registrar may from time to time impose,

g) in any other mode permitted by the rules, or by general or specified order of the State Government.

2. Notwithstanding anything contained in sub-section(1), the Registrar may, with the approval of the Stat Co-operative Council, order a society or a class of societies to invest any funds in a particular manner, or may impose conditions regarding the mode of investment of such funds.

As per Section 71 (1)(g) of the Act, 1961, it appears from the facts of the case, the State of Gujarat has given permission to invest amount with Respondent No.4 Corporation- Limited vide its order dated 18th November, 1997. This permission granted by the Government permits the petitioner co-operative society to invest the amount, not only in the enlisted institutions which are referred to in Section 71 but also additionally in the Corporation-Limited which is permitted by the State of Gujarat under Section 71(1) (g) of the Act, 1961. Thus, the permission granted by the Government never compelled petitioner-society to invest the amount, only in Gujarat Small Industries Corporation Limited. The discretion was always vested in the

petitioner-society to chose the institution. The discretion to choose the institution given under Section 71 of the Act, 1961, was never taken away by the State of Gujarat on the contrary, scope to choose the institution is widen, by such permission. Wisdom ought to be utilised properly by those who are managing the affairs of the petitioner-society before investment. The State of Gujarat has not compelled the petitioner to invest surplus amount in the Respondent No.4 Corporation only. What is granted by the government was a permission to chose one more institution for the their investment, but there was no compulsion by the State of Gujarat for the investment of the surplus fund in Respondent No. 4 Corporation.

(ii) The petitions preferred by the petitioners is nothing but a money suit based upon unsecured, non-convertible bonds in the nature of promissory notes.

(iii) There is no privity of contract between the petitioners in all the aforesaid petitions and the State of Gujarat. The State of Gujarat is

not a guarantor of Respondent No.4. Corporation-Limited.

(iv) There is no legal right or a contractual right or a fundamental right vested in the petitioner to get money recovered from Respondent Nos.1 and 2- the State of Gujarat. In fact, there is no enforceable right vested in the petitioners for the recovery of the money from State of Gujarat. Right is a interest recognized and protected by rule of law. No such interest vested in the petitioners has been recognized and protected by rule of law which compel the State of Gujarat to make payment of dues of Respondent No. 4 Corporation. The petitioners have purchased “unsecured bonds”. The petitioners' wisdom has failed because of either financial condition of Respondent No.4 Corporation or because of lack of technical knowledge on the part of the petitioners. There was no compulsion by the State of Gujarat to invest the surplus amount with Respondent No.4 only. Out of several institutions which are referred to in Section 71 of the Act, 1961, the petitioner has to chose one or more. Thus, petitioner is always taking

risk whenever investment is not properly made.

(v) There is a vast difference between the Corporation and the Government itself. The concept of the Government-Company is not unknown within the Companies Act, 1956. Government can float Government-Company under the Companies Act, 1956. The liability of the Government-Company and the liability of the Government are not synonymous to each other. Respondent No.4 is a Company Limited which can sue and can be sued also. Respondent No.4 is a separate legal entity. There are separate provisions under the Companies Act, 1956 for the Government-Company, right from Section 617 onwards of the Act, 1956 but nowhere liability of the Government Company has been held as liability of the Government. Respondent No.4 was doing a business which was a commercial one. The functions of Respondent No.4 was never sovereign one and therefore, any liability arising out of failure of commercial transaction between the petitioners and Respondent No.4 Corporation-Limited , the State Government cannot be held liable for the same. Looking to the articles of the Association and

memorandum of association of Respondent No.4 Company (Annexure – II of the further affidavit-in-reply of the petitioner), the main object and other objectives of Respondent No.4 Corporation-Limited were ordinary and commercial business activities and therefore, Respondent No.4 if is unable to redeem the unsecured, non-convertible bonds withtin the time prescribed therein, then the State Government is not responsible for the payment towards such unsecured, non-convertible bonds.

(vi) It is also vehemently submitted by the learned Counsel for the petitioner and relying upon several decisions that Respondent No.4 Corporation-Limited is an instrumentality or agency of the State Government and therefore, for the Act of the agent, the principal is responsible. The learned Counsel for the petitioner has replied upon several decisions but they are not helpful to the petitioners for the reasons that all these judgments are pertaining to the discussion as to the meaning of words “other Authorities” under Article 12 of the Constitution of India. The words

“instrumentality” and “agency”, of the Government, “deep and pervasive control” of the government and such other tests have been referred to in those judgments cited by the learned Counsel appearing for the petitioners while giving meaning to words “the State” as per Article 12 of the Constitution of India. There is not a single judgment cited by the learned Counsel appearing for the petitioner, which points out that for the liability of the Government Company, the Government will be responsible. Thus, judgments cited by the learned Counsel for the petitioners are not helpful to the petitioners. In the aforesaid proposition, the only exception curved out by the Hon'ble Supreme Court is the case of ***Kapila Hingorani v. State of Bihar reported in (2003) 6 SCC 1***. The facts of that case are not comparable with the facts of the present case. In the case decided by Hon'ble Supreme there was violation of Article 21 of the Constitution of India. The salaries were not paid for considerably longer period and therefore, in that reference and contexts, the Hon'ble Supreme Court has passed directions against the

Government of Bihar paragraph 74 reads as under:

> *"74. We, however, hasten to add that we do not intend to lay down a law, as at present advised, that the State is directly or vicariously liable to pay salaries / remunerations of the employees of the public sector undertaking or the government companies in all situations. We, as explained hereinbefore, only say that the State cannot escape its liability when a human rights problem of such magnitude involving the starvation deaths and / or suicide by the employees has taken place by reason of non-payment of salary to the employees of public sector undertakings for such a long time. We are not issuing any direction as against the State of Jharkhand as no step had admittedly been taken by the Central Government in terms of Section 65 of the State Reorganisation Act and furthermore as only four public sector undertaking have been transferred to the State of Jharkhand in respect whereof the petitioner does not make any grievance. "*
>
> *(emphasis supplied)*

This aforesaid judgment is not helpful to the petitioner. Looking to the facts of the present case, it is simple failure of the commercial transaction which has resulted into the disability of Respondent No.4 and redeemtion of unsecured, non-convertible debentures and therefore, the State Government cannot be held responsible. The State Government is not a guarantor of Respondent No.4 and therefore, the State is not responsible under the Gujarat State

Guarantors Act, 1963 for the defaults made by Respondent No.4 Corporation-Limited.

(vii)It has been held by Hon'ble Supreme in the case of ***M/s. Burmah Construction Company, Appellants v. The State of Orissa reported in AIR 62 SC 1320*** that High Courts normally do not entertain the petitions to interfere civil liability arising out of breach of contract or tort. Paragraph No.6 of the said judgment reads as under :

> *"6. It is not necessary to consider in this case whether S.14 prescribes the only remedy for refund of tax unlawfully collected by the State. The appellants have not filed any civil suit for a decree for refund of tax unlawfully collected from them. This appeal arises out of a proceedings filed in the High Court substantially to compel the Collector to carry out his statutory obligations under S. 14 of the Act. The High Court normally does not entertain a petition under Art. 226 of the Constitution to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimants and leaves it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But an order for payment of money may sometimes be made in a petition under Art. 226 of the Constitution against the State or against an officer of the State to enforce a statutory obligation. The petition, in the present case is for enforcement of the liability of the Collector imposed by statute to refund a tax illegally collected and it was maintainable: but it can only be allowed*

subject to the restrictions which have been imposed by the Legislature. It is no open to the claimant to rely upon the statutory right and to ignore the restrictions subject to which the right is made enforceable."

(Emphasis supplied)

(viii)It has been held by Hon'ble Supreme Court of India in the case of ***Suganmal, Appellant v. State of Madhya Pradesh and others, Respondents reported in AIR 1965 SC 1740*** that though High Courts have power to pass any appropriate order in exercise of powers under Article 226 of the Constitution, but the petitions which is solely praying for refund of money is not maintainable. Paragraph No. 6 of the judgment reads as under:

"6. On the first point, we are of opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Art. 226 of the Constitution, such a petition solely praying for the issue of a Writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally, collected the money as a tax. We have been referred to cases in which orders had been issued directing the State to refund taxes illegally collected, but all such cases had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in

which the Courts were moved by a petition under Art. 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realized, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality and, therefore, could take action under Art.226 for the protection of their fundamental right and the Courts, on setting aside the assessment order exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and, therefore, hold that no petition for the issue of writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right."

(emphasis supplied)

Thus, from the aforesaid judgments it is clear that when such petition is preferred for recovery of the money, the Court will be slow in entertaining such petition as the petitioners can prefer money suit. In the facts of the present case, the petitioners are unsecured creditors. The Bonds issued by Respondent No.4 are "unsecured, non-convertible bonds in the nature of promissory notes". Thus, suit can be

filed on the basis of such promissory notes and in fact several suits have been filed, by different claimants, in the trial courts.

(ix) The petitioner is seeking writ of mandamus against Respondent Nos.1 and 2. The cardinal principle for issuance of Writ of Mandamus is that there must be breach of public duty, by the Respondent. The petitioner has to show that the statute imposes legal duty and the petitioner has a legal right under the Statute to enforce its performance. In the present case, the petitioners have failed in pointing out that there is legal duty vested in the State of Gujarat and there is a legal right vested in the petitioner under the Statue to enforce its performance. The present case is pure and simple case of civil liability, arising out of, breach of contract and therefore, no Mandamus can be issued for the enforce thereof in the facts of the present case. It has been held by Hon'ble Supreme Court in the case of ***National Textile Corpn. Ltd. And Others v. Haribox Swalram and Others reported in (2004) 9 SCC 786*** especially, in paragraph No. 17 which reads as under:

> *"17. We are also in agreement with the view taken by the learned Single Judge that the writ petition which was filed in December 1989 was highly belated as the claim of the writ petitioners had been categorically refuted by the letter dated 7-11-1984 by the Director (Finance) on behalf of National Textile Corporation (South Maharashtra) Ltd. The petition was therefore, liable to be rejected on this ground alone. That apart, the prayer made in the writ petition is for issuance of a writ of mandamus directing the appellant herein to supply the goods (cloth). It is well settled that in order that a mandamus be issued to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance. The present is a case of pure and simple business contract. The writ petitioners have no statutory right nor is any statutory duty case upon the appellants whose performance may be legally enforced. No writ of mandamus can, therefore, be issued as prayed by the writ petitioners."*
>
> (Emphasis supplied)

(x) It is vehemently argued by the learned Counsel for the petitioner that there is no difference between the Government Company and the Government. Whenever there is default by the Government Company, the Government should be held responsible. This argument is not accepted by this Court. On the contrary there is vast

difference between Government Company and the Government itself. The Government Company is separate legal entity under the Companies Act, 1956. The Government Company can sue and can be sued but it is distinct from that of Government. There is a clear distinction between Company and its share holders. Even if there is one share holder and i.e. State Government, even in that case, the Company is a distinct legal entity other than share holder, in the eyes of law. It has been held by Hon'ble Supreme Court in paragraphs No.s 15 and 16 in the case of ***M/s. Electronics Corporation of India Ltd. Etc. Appellants v. Secretary, Revenue Deptt., Govt. of Andra Pradesh and others etc. reported in AIR 1999 SC 1734*** as under:

> *"15. A clear distinction must be drawn between a company and its shareholder, even though that shareholder may be only one and that the Central or a State Government. In the eye of the law, a company registered under the Companies Act is a distinct legal entity other than the legal entity or entities that hold its share.*
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> *16. In Western Coalfields Ltd. v. Special Area Development Authority, Korba (1982) 1 SCC 125 (AIR 1982 SC 697), this Court reviewed earlier judgments on the point. It held that even though the entire share capital of the appellant before it had*

been subscribed by the Government of India, it could not be predicated that the appellant itself was owned by the Government of India. Companies, it was sad, which are incorporated under the Companies Act, have a corporate personality of their own, distinct from that of the Government of India. The lands and the buildings in question in that matter were vested in and owned by the appellant. The Government of India only owned the share capital."

(Emphasis supplied)

(xi) Similar view has been taken in two other judgments delivered by the Hon'ble Supreme Court in case of ***Food Corporation of India, Appellate v. Municipal Committee, Jalalabad and another, Respondents reported in AIR 1999 SC 2573 (paragraph 7)*** and in case of ***Board of Trustees for the Visakhapatnam Port Trust etc., Appellants v. State of Andra Pradesh and others, Respondents reported in AIR 1999 SC 2552 (paragraph 4 and 5).***

In both the aforesaid cases, it has been held that Government Company and Government are distinct from each other. Thus, in the facts of the present case, Respondent No.4 Corporation-Limited and the State Government are two distinct and separate personalities so far as liability is concerned. Respondent No.4

Corporation-Limited is Government Company. Major shares have been held by the State Government but that fact does not fasten any liability upon the State Government for the payment of dues of Respondent No.4 Corporation-Limited. It has been held by Hon'ble Supreme Court in Paragraph No. 19 of the case of ***Hindustan Steel Works Construction Ltd., Appellants v. State of Kerela and others, Respondents reported in AIR 1997 SC 2275*** as under:

> *"19. After giving our careful consideration to the facts of the case and the respective contentions made by the learned counsel for the parties, it appears to us that the appellant company cannot be held to be a department of the government. There may be deep and pervasive control of the government over the appellant company and the appellant company, on such account may be an instrumentality or agency of the Central Government and as such a "State" within the meaning of Art. 12 of the Constitution. Even though the appellant company is an agency or instrumentality of the Central Government, it cannot be held to be a department or establishment of the government in all cases, such instrumentality or agency has been held to be a third arm of the government in Ajay Hasia's case (AIR 1981 SC 487) but it should not be lost sight of that it was only in the context of enforcement of fundamental rights against the action of government and its instrumentalities or agencies it was held that such agencies were the third arm of the government and they cannot avoid constitutional obligation. There is no question of enforcing any fundamental right in the instant case. On the contrary, the*

question of protecting the welfare of the employees viz-a-viz the instrumentality or agency of the Central Government under the Welfare Funds Act is to be kept in mind for the purpose of deciding the rival contentions of the parties. If clauses 2(c) and (e) of the Welfare Funds Act are taken into consideration, it will be quite apparent that the legislature has not intended to exclude the government company or the statutory corporations from the purview of the Welfare Funds Act. The decision in C.R.Raman's case in our view, is not an authority for the proposition that an instrumentality or agency of the government department for all purposes and such intrumentality or agency will enjoy the same privilege and protection which any government or its establishment or department enjoys in relation to a statute. The establishment of a government only connotes in its plain meaning, an establishment directly run by the government and not through the agency or instrumentality of the Government. The welfare Funds Act is essentially an act to protect the interest of and welfare of the labourers. Unless expressly the instrumentality or agency of the government is kept outside the purview of the said Act, it would not be proper to interpret the said Act in a wide amplitude by removing the corporate veil so as to exclude such instrumentality or agency from the purview of the said Act."

(Emphasis supplied)

From the above aforesaid judgments, it is clear that even if there is deep and pervasive control of the Government upon a Company, the same may be instrumentality or a agency of the Government or it may be "State" within the meaning of Article 12 of the Constitution of India, however, it cannot be held as department

or establishment of the Government in all cases except for enforcement of fundamental right. The exception cannot be converted into a rule. In the facts of the present case, there is no fundamental right vested in petitioners to get the recovery of their money due under redemption of unsecured, non-convertible bonds in the nature of promissory notes and therefore, Government of Gujarat is not responsible for the payment which is to be made by Respondent No.4.

(xii) It has been held by High Court of Kerla in the case of ***Dat Pethe and another, Petitioners v. District Collector, Ernakulam and others, Respondent reported in AIR 1976 Kerala 37,*** in paragraph No. 6 of the said judgment which reads as under:

> *"6. In the Allahabad case cited by the counsel for the respondents (K.N.Gupta v. Collector of Dehradun 1959 All LJ 789) we are at a loss to know as to what the constitution of the Rehabilitation Finance Administration was; and we find that the question whether the amounts due to the administration was or was not, amounts due to the Government did not come for consideration in that case. At any rate, in view of the decision of the Supreme Court it will not be necessary to consider that decision at great length. There could be little doubt that an amount due to the Corporation, incorporated under the provisions of a statute, as a body*

> *corporate with perpetual succession and a common seal with right to sue, and liability to be sued in its corporate name, could not be treated as an amount due to the Government for the purpose of invoking the provision of Section 3 of the Act. All that Section 38 of the Goa, Daman and Diu Industrial Development Act, 1965, lays down is that all sums payable by any person to the Corporation shall be recoverable as arrears of land revenue on the application of the Corporation. The amount referred to is what is due to the 'Corporation' as distinct from what was due to Government or the Collector. As the amount is not due to the Collector or to the Government the 5th respondent does not derive jurisdiction to issue the certificate for recovery of the amount as arrears of land revenue. All that the section contemplates is that the amount is recoverable as arrears of land revenue; and that is possible only by adhering to the procedure prescribed in the Act."*
>
> *(Emphasis supplied)*

Thus, a trading activity carried out by the Government Company is not trading carried out by the State. Thus, in the present case for the default of Respondent No.4 Corporation-Limited State is not responsible. Civil liability, of Government Company is different, from, sovereign liability, of the State.

(xiii)It has been held by Hon'ble Supreme Court in **A.K.Bindal & Anr. Union of India & Ors.** reported in JT 2003(4) SC 328 that identification of the Government Company remains distinct from the

Government funds. If entire share holding is owned by the Government, it will not make an incorporated Company, a Government. Public Sector Undertaking in the present trend of economics is not unknown. Special laws are made applicable to such Companies. Even under the Company's Act, 1956, certain privileges have been given to the Government Companies. Nonetheless, because of permutations and combinations several factors, Public Sector Enterprises have become sick and even referred to BIFR. Even in such circumstances, time and again, the Hon'ble Supreme Court has pointed out that Government Company is a separate legal entity. Government and Government Company are not synonymous to each other. This is a correct legal proposition right from ***Salomon v. A. Salomon & Company Limited reported in 1897 AC 22.*** **P**aragraph Nos. 13 to 16 of the aforesaid judgment viz JT 2003(4) SC 328 reads as under:

> *"13. The Fertilizer Corporation of India and Hindustan Fertilizer Corporation are both companies registered under the Companies Act with the only difference that they are Government Companies within the meaning of Section 617 of the Companies Act. What will be the legal position of a Government Company and whether its employees will be treated to*

be government Servants was examined in ***Heavy Engineering Mazdoor Union v. State of Bihar & Ors. a****nd it was held as under in para 4 of the reports:*

> *".....It is an undisputed fact that the company was incorporated under the Companies Act and it is the company so incorporated which carries on the undertaking. The undersigned, therefore, is not one carried on directly by the Central Government or by any one of its departments as in the case of posts and telegraphs or the railways....."*

14. After referring to the well known decision in ***Saloman v. A. Saloman & Co. Ltd.*** *Halsbury's Laws of England and some other English decisions the Court ruled as under:*

> *"..... Therefore, the mere fact that the entire share capital of the respondent-company was contributed by the Central Government and the fact that all its shares are held by the President and certain officers of the Central Government does not make any difference. The company and the share holders being, as aforesaid, distinct entities the fact that the President of India and certain officers hold all its shares does not make the company an agent either of the President or the Central Government....."*

15. Again in para 5 it was held that the fact a minister appoints the members or directors of a corporation and he is entitled to call for information, to give directions which are binding on the directors and to supervise over the conduct of the business of the corporation does not render the corporation an agent of the State.

16. The legal position is that identity of the Government Company remains distinct from the government. The Government Company is not identified with the Union but has been placed under a special system of control and conferred certain privileges by virtue of the provisions

contained in section 619 and 620 of the Companies Act. Merely because the entire share holding is owned by the Central Government will not make the incorporated company as Central Government. It is also equally well settled that the employees of the Government Company are not civil servants and so are not entitled to the protection afforded by Article 311 of the Constitution ***(Pyare Lal Sharma v. Managing Director)****. Since employees of Government Companies are not government servants they have absolutely no legal right to claim that government should pay their salary or that the additional expenditure incurred on account of revision of their pay scale should be met by the government. Being employees of the companies it is the responsibility of the companies to pay them salary and if the company is sustaining losses continuously over a period and does not have the financial capacity to revise or enhance the pay scale, the petitioners cannot claim any legal right to ask for a direction to the Central Government to meet the additional expenditure which may be incurred on account of revision of pay scales. It appears that prior to issuance of the Office Memorandum dated 12.4.1993 the Government had been providing the necessary funds for the management of Public Sector Enterprises which had been incurring losses. After the change in economic policy introduced in early nineties, Government took a decision that the Public Sector Undertaking will have to generate their own resources to meet the additional expenditure incurred on account of increase in wages and that the government will not provide any funds for the same. Such of the Public Sector Enterprises (Government Companies) which had become sick and had been referred to BIRF, were obliviously running on huge losses and did not have their own resources to meet the financial liability which would have been incurred by revision of pay scales. By the Office Memorandum dated 19/7/1995 the Government merely reiterated its earlier stand and issued a caution that till a decision was taken to*

revive the undertakings no revision in pay scales should be allowed. We, therefore, do not find any infirmity legal or constitutional in the two office Memorandum which have been challenged in the writ petitions."

(Emphasis supplied)

(xiv)The petitioners are seeking liability of the Government Company as the liability of the Government. Several unsuccessful attempts have been made by filing several petitions in different decades. A golden thread running through out the aforesaid judgments, says that Government Company and the Government are two distinct personalities. Activities of the Government and the Commercial activities of the Company are different. One is not liable for another. One more such case has been decided by Hon'ble Supreme Court in ***Officers & supervisor of I.D.P.L. v. Chairman & M.D. I.D.P.L and Others reported in JT 2003 (6) SC 68*** paragraph Nos. 7 & 8 of the judgment reads as under:

"7. In the above background, the question which arises for consideration is whether the employees of public sector enterprises have any legal right to claim revision of wages that though the industrial undertaking or the companies in which they are working did not have the financial capacity to grant revision in pay-scale,

yet the government should give financial support to meet the additional expenditure incurred in that regard.

8. We have carefully gone through the pleadings, the annexures filed by both sides and the orders passed by the BIFR and the judgments cited by the counsel appearing on either side. Learned Counsel for the contesting respondent drew our attention to a recent judgment of this Court in A.K. Bindal and Another v. Union of India and others in support of her contention. We have perused the said judgment. In our opinion, since the employees of government companies are not government servants, they have absolutely no legal right to claim that the government should pay their salary or that the additional expenditure incurred on account of revision of their pay-scales should be met by the government. Being employees of the companies, it is the responsibility of the companies to pay scale, the petitioners, in our view, cannot claim any legal right to ask for a direction to the Central government to meet the additional expenditure which may be incurred on account of revision of pay-scales. We are unable to countenance the submission made by Mr. Sanghi that economic viability of the industrial unit or the financial capacity of the employer cannot be taken into consideration in the matter of revision of pay-scales of the employees."

(Emphasis supplied)

(xv) The submission canvassed by the petitioners on the basis of the judgment of the Hon'ble Supreme Court in ***Kapila Hingorani v. State of Bihar reported in (2003) 6 SCC 1*** is not at all helpful to the petitioners. The exception has been

carved out from the rule of separate legal entity for the reasons that there was breach of human dignity, there was breach of human right and therefore, there was breach of provisions of Constitution, especially, right to life, enshrine in Article 21 of the Constitution of India. The breach of right canvassed by the present petitioners in the aforesaid petitions cannot be compared with breach of human dignity or human right or breach of right to life guaranteed under Article 21 of the Constitution of India as stated herein in paragraph 74 of the said judgment. It has been made clear by the Hon'ble Supreme Court that it cannot be said in all the cases that Government is responsible for the acts and deeds of the Government Company. All that depends upon the facts and circumstances of each case. Looking to the facts and circumstances of the present case and the nature of transaction which is based upon non redemption of “unsecured, non-convertible bonds in the nature of promissory notes”, the aforesaid petitions are not entertained by this Court, as there is no liability vested in the Government or there is no legal duty vested in

the Government for redemption of those “unsecured, non-convertible bonds”.

8. As a cumulative effect of the aforesaid facts and reasons and on the basis of judicial pronouncements, the petitions fail. Rule is discharged. Interim relief granted, if any in each of the petitions is vacated. No order as to costs.

[D.N.PATEL, J.]

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